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Nos. 87-1614, 87-1639, and 87-1668

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

RICHARD ARRINGTON, JR., ET AL., PETITIONERS

v.

ROBERT K. WILKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether individuals may be barred from challenging employment-related actions taken under a consent decree entered in a Title VII suit, where the individuals were neither parties to nor intervenors in the action and did not consent to the terms of the decree.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-24a) is reported at 833 F.2d 1492. The district court's initial findings of fact and conclusions of law (Pet. App. 27a-66a) are reported at 39 Fair Empl. Prac. Cas. (BNA) 1431. The district court's additional findings of fact (Pet. App. 69a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1987. Timely petitions for rehearing were denied on January 25, 1988 (Pet. App. 25a). The petition for a writ of certiorari in No. 87-1614 was filed on March 30, 1988; the petition for a writ of certiorari in No. 87-1639 was filed on April 1, 1988; and the petition for a writ of certiorari in No. 87-1668 was docketed as of March 31, 1988. The petitions were granted and consolidated on June 20, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In January 1974, the Ensley Branch of the National Association for the Advancement of Colored People and seven black individuals filed separate class action complaints in the United States District Court for the Northern District of Alabama against the City of Birmingham (City), the Personnel Board of Jefferson County, Alabama (Board), and other local government officials (Pet. App. 3a-4a). The complaints alleged that the City and Board had engaged in racially discriminatory hiring and promotion practices in various public service jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 and 1983 (Pet. App. 4a & n.3). In May 1975, the United States filed a similar

complaint against the City and Board, alleging a pattern and practice of discriminatory hiring practices against blacks and women (*ibid.*).

The district court consolidated the three cases and held a bench trial in December 1976 limited to the issue of the validity of police and firefighter entry-level tests used by the City and Board. In January 1977, the court found that the tests adversely affected black applicants and were not sufficiently job-related and thus held that the tests were discriminatory in violation of Title VII (Pet. App. 4a). See *Ensley Branch of the NAACP* v. *Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), aff'd, 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 (1980).

In August 1979, the district court held a second trial concerning the validity of other testing and screening devices used by the Board. Before the court issued its decision, however, the parties entered into ultimately fruitful settlement negotiations. Pet. App. 4a-5a. In June 1981, the plaintiffs and the United States jointly entered into two consent decrees—one with the City (Pet. App. 122a-201a), and one with the Board (*id.* at 202a-235a). Although containing no admissions or adjudications of liability, the decrees provided "an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters and the promotion of blacks to the position of fire lieutenant" (*id.* at 5a (footnote omitted)). Paragraph 2 of the decree with the City made clear, however, that (*id.* at 124a)

> [n]othing herein shall be interpreted as requiring the City to * * * promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure.

2. After entering an order provisionally approving the decrees,[1] the district court, on August 3, 1981, held a fairness hearing to consider the objections of interested nonparties (Pet. App. 238a). The Birmingham Firefighters Association 117 (BFA), among others, appeared and filed objections as amici curiae (J.A. 699-713). After the hearing but before final approval of the decrees, the BFA and two of its members moved to intervene as of right in each of the three original actions, contending that the proposed decrees would adversely affect their rights (J.A. 772-776; Pet. App. 5a-6a). On August 21, 1981, the district court entered an order approving the consent decrees and denying the motions to intervene as untimely (Pet. App. 236a-249a). See *United States* v. *Jefferson County*, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), aff'd, 720 F.2d 1511 (11th Cir. 1983).

3. After the entry of the district court's order, seven white firefighters, all members of the BFA, filed a complaint in the district court against the City and the Board. See *Bennett* v. *Arrington*, No. CV-82-P-0850-S (N.D. Ala.) (Pet. App. 110a-121a). The complaint alleged that enforcement of the consent decrees would discriminate against them in violation of Title VII and sought a preliminary injunction. The district court denied the request for injunctive relief. J.A. 37; Pet. App. 6a, 110a.

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[1] That order, issued on June 8, 1981, also certified the settlement classes. Under that order, the parties published in local newspapers notice of the decrees, inviting interested persons to appear at the scheduled fairness hearing before the district court. J.A. 694-696; see *id.* at 697-698. The parties also mailed to each member of the minority and female subclasses an explanation of the decrees and notice of the scheduled fairness hearing. See Pet. App. 171a-175a, 180a-201a.

The court of appeals affirmed. *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983) (J.A. 149-161).[2] The court held that the white firefighters were not entitled to injunctive relief because of their inadequate showing of irreparable harm (720 F.2d at 1519-1520; J.A. 160-161). The court also dismissed the firefighters' appeal from the denial of intervention, holding that the district court had not abused its discretion, in part because the firefighters could "institut[e] an independent Title VII suit, asserting the specific violations of their rights" (720 F.2d at 1518; J.A. 158).[3]

4. After unsuccessfully seeking preliminary injunctive relief, the firefighters pursued their complaint in the district court against the City and the Board. A second group of white firefighters, the *Wilks* respondents, filed a similar complaint against

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[2] The appeal from the district court's order denying injunctive relief was consolidated with the appeal from the court's order denying intervention (J.A. 152-153; Pet. App. 7a).

[3] The court of appeals also upheld the district court's exercise of its discretion under Fed. R. Civ. P. 24(a) on the grounds that "[t]he BFA members * * * knew at an early stage in the proceedings that their rights could be adversely affected" (720 F.2d at 1516; J.A. 154) and that the grant of intervention "would plainly have prejudiced the existing parties, since it would have nullified these negotiations [for a settlement] with the Board and allowed a pattern of past discriminatory practices to continue" (720 F.2d at 1517; J.A. 155).

In the court of appeals, the United States contended that the motions to intervene were untimely, prejudicial to the parties, and improper under Fed. R. Civ. P. 24(a). See Brief for the United States at 14-26, *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

the City and the Board. See *Wilks* v. *Arrington*, No. CV-83-AR-2116-S (N.D. Ala.) (J.A. 130-134); Pet. App. 7a. The complaint alleged that the City and the Board had denied promotions to the white firefighters in favor of certain less qualified black firefighters, in violation of Title VII and the Equal Protection Clause; the complaint further sought to enjoin the City from making those promotions (J.A. 130-134; Pet. App. 7a). Several other city employees who had been denied promotions also filed similar complaints against the City and the Board.[4] In addition, the United States brought suit against the City and the Board, alleging that the City's practice of promoting blacks over demonstrably better qualified whites violated, inter alia, Title VII and the Equal Protection Clause (J.A. 258-262; Pet. App. 8a).[5] In

[4] See *Birmingham Ass'n of City Employees* v. *Arrington*, No. CV-82-P-1852-S (N.D. Ala.) (J.A. 91-100); *Zannis* v. *Arrington*, No. CV-83-AR-2680-S (N.D. Ala.); *Garner* v. *City of Birmingham*, No. CV-82-M-1461-S (N.D. Ala.); *Howard* v. *City of Birmingham Pub. Inspection Services*, No. CV-83-P-3010-S (N.D. Ala.).

[5] The United States, as a signatory to the consent decrees, was originally named as a defendant in two of the "reverse discrimination" actions, as the district court called them. The district court later granted the United States' motion to intervene as party plaintiff in the remaining cases. The court also granted the United States' motion to realign itself as plaintiff in the two suits in which it had been named as a defendant. J.A. 292, 329; Pet. App. 8a & n.10.

The *Martin* petitioners, as the plaintiffs in the original 1974 action and signatories to the consent decrees, moved both in their individual capacities and as class representatives to intervene as parties defendant in several suits. The district court permitted the *Martin* petitioners to intervene only in their individual capacities. See J.A. 46-47, 106-108, 169-171, 185-187; Pet. App. 9a & n.12.

April 1984, the district court consolidated the actions under the caption "In re Birmingham Reverse Discrimination Employment Litigation" (J.A. 218-219; Pet. App. 9a).

After a trial in December 1985 concerning only the promotion of blacks in the City's Fire and Engineering Departments, the district court granted the Board's motion to dismiss (Pet. App. 11a, 27a-66a). The court concluded that "[the] plaintiffs cannot collaterally attack the [consent] Decree's validity" (*id.* at 61a), and focused its attention on the City's compliance with paragraph 2 of the consent decree (see page 3, *supra*). See J.A. 237-238, 250-251, 280-288. The court further held that the *Wilks* respondents and the United States were bound by the consent decrees and concluded that there had been no showing that the City's promotion practices violated paragraph 2 (Pet. App. 10a-11a, 60a-64a).

5. On appeals by the *Wilks* respondents, who by then included one white employee of the City's Engineering Department as well as the firefighters, and the United States, a divided panel of the court of appeals reversed and remanded for trial the *Wilks* respondents' claims under Title VII and the Equal Protection Clause.[6] The court held that "[b]ecause * * *

[6] The court of appeals instructed the district court (Pet. App. 19a), on remand, "to evaluate the defendants' justification for the challenged promotions under the standards articulated in" *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987). The court further instructed the district court to review the consent decrees with the "heightened scrutiny" (Pet. App. 20a) required by *Johnson*. See *Johnson* v. *Transportation Agency*, slip op. 19-20 (inquiry whether affirmative

[the *Wilks* respondents] were neither parties nor privies to the consent decrees, * * * their independent claims of unlawful discrimination are not precluded" (Pet. App. 12a-13a). The court explicitly rejected the "doctrine of 'impermissible collateral attack'" (*id.* at 13a) espoused by other courts of appeals to "immuniz[e] parties to a consent decree from charges of discrimination by nonparties, provided the alleged discriminatory acts were taken pursuant to the consent decree" (*ibid.*). See, *e.g.*, *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981). The court stated that "[t]he policy of encouraging voluntary affirmative action plans," a rationale for the doctrine against collateral attacks, "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed" (Pet. App. 14a). The court recognized that the *Wilks* respondents' "Title VII claims did not accrue until after the decrees became effective and the challenged promotions were made" and that the *Wilks* respondents did not have "an identity of interest with a party to the consent decrees such that they should

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action plan "unnecessarily trammeled" rights of nonminority employees).

The court of appeals also affirmed the district court's dismissal of the United States' claims, holding that "the United States is estopped from collaterally attacking the consent decrees because it is a party to them" (Pet. App. 20a), without discussing the propriety of the United States asserting the right of others to challenge the decrees. Despite contrary allegations (see, *e.g.*, 87-1614 Br. 10), the United States recognizes that the consent decrees require it to defend their validity, and has not sought review of that holding.

be treated as parties for preclusion purposes" (*id.* at 15a).[7]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the collateral attack doctrine may not preclude individuals, such as the *Wilks* respondents, from challenging employment-related actions taken under Title VII consent decrees to which they were not a party. As a threshold matter, that issue was presented to the court of appeals—and is properly presented to this Court—because it is at least unclear that the district court in fact ruled on the merits of respondents' challenge to the consent decrees. The district court was explicit in holding that respondents were barred under the collateral attack doctrine from challenging the terms of the consent decrees, and its limited references to the propriety of various aspects of the decrees do not clearly indicate that it proceeded—unnecessarily given its other ruling—to decide the merits of respondents' challenge.

It is a fundamental principle of due process that a judgment may not be held binding on a litigant who was neither party nor privy to the litigation in which that judgment was entered. While certain carefully drawn exceptions to this rule against nonparty pre-

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[7] Judge Anderson dissented, stating that "the appropriate resolution of this case would distinguish between the individual plaintiffs' claim for back pay and their claim for prospective relief" (Pet. App. 22a). Judge Anderson contended that the City should not be liable for back pay (*id.* at 22a-24a). He agreed substantially with the majority, however, that the "plaintiffs are not bound by the consent decree and should be free on remand to challenge the consent decree *prospectively* and test its validity" (*id.* at 24a (emphasis added)).

clusion exist, none is applicable here. In particular, no certified class in the original lawsuit adequately represented the interests of the *Wilks* respondents, nor did those respondents exercise control over the conduct of any party in that litigation. Thus, the consent decree that was entered represented neither an agreement nor an adjudication to which respondents could fairly be bound.

The collateral attack doctrine is also inconsistent with the approach to intervention and joinder established by the Federal Rules of Civil Procedure. The drafters of those rules determined that the concern for finality of judgments would be better served by mandatory joinder than by mandatory intervention procedures. Accordingly, in Rule 19, they placed the burden on the courts and the existing parties, not on the nonparties, to ensure that the risk of double, multiple, or otherwise inconsistent judgments is minimized.

A contrary reading of Rule 19 cannot be justified on the basis of particular difficulties alleged to ensue from application of the rule's clear meaning. Neither the specter of multi-party litigation nor asserted problems in pursuing defendant class actions are persuasive arguments for placing on nonparties the burden to join or be bound anyway, contrary to the clear intention of the drafters of the Federal Rules. Nor, especially in view of existing provisions for transfer and consolidation of lawsuits, and the principles of stare decisis and comity, can the danger of inconsistent or contradictory proceedings justify the rule petitioners assert.

Finally, this Court has recognized that the policy favoring settlement of Title VII suits cannot be used to justify the abrogation of nonparties' legal rights. Allowing third persons to challenge consent decrees

will not stop parties from entering into mutually advantageous settlements and, in any event, true voluntary compliance with Title VII requires either that all interested persons consent to any settlement agreement or that the agreement negotiated be able to withstand their third-party challenge.

ARGUMENT

INDIVIDUALS ARE ENTITLED TO CHALLENGE EMPLOYMENT-RELATED ACTIONS TAKEN UNDER CONSENT DECREES TO WHICH THEY WERE NOT A PARTY

The court of appeals correctly held that the collateral attack doctrine may not preclude individuals, such as the *Wilks* respondents, from challenging employment-related actions taken under consent decrees entered in the *Jefferson County* litigation, and properly remanded the case for consideration of the merits of respondents' challenge.

A. *This Case Properly Presents The Question Whether Individuals Who Are Not A Party To A Consent Decree May Challenge It In Subsequent Litigation*

Petitioners claim (87-1614 Br. 34-41; 87-1639 Br. 17-18; 87-1668 Br. 35-40) that the court of appeals erred in remanding the case because the district court did, in fact, fully adjudicate the *Wilks* respondents' challenge under Title VII and the Equal Protection Clause. That contention distorts the record. The district court concluded that the *Wilks* respondents "cannot collaterally attack the Decree's validity," and stated that "[t]he only avenue of attack open to the private plaintiffs is to show that challenged action was not taken pursuant to the Decree" (Pet. App. 61a-62a, 106a). The district court also found the fact that an action was taken pursuant to a con-

sent decree to be "proof that it was not taken with the requisite discriminatory intent" (*id.* at 62a, 107a). Thus the district court plainly viewed respondents as barred from challenging the provisions of the consent decree or any actions taken under its direction. The fact that it also made passing references to its continuing belief in the correctness of the decree (*id.* at 39a-40a, 62a, 84a-85a, 106a) cannot, in this context, be viewed with assurance as a resolution of the merits of the claims. Thus, the court of appeals correctly proceeded on the premise that the district court's application of the collateral attack doctrine was dispositive.

B. *The Collateral Attack Doctrine Is Inconsistent With Notions Of Procedural Fairness, Which Require That A Person Be Bound Only Upon His Own Agreement Or After Receiving His Day In Court*

This Court has long stated that "[i]t is a violation of due process for a judgment to be [held] binding on a litigant who was not a party or a privy" to the litigation in which the judgment was entered (*Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n.7 (1979)). See, *e.g.*, *Blonder-Tongue Laboratories, Inc.* v. *University Found.*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Hansberry* v. *Lee*, 311 U.S. 32, 40-42 (1940). As Chief Justice Rehnquist has noted, "[t]his rule can be traced to an opinion of Chief Justice Marshall in *Davis* v. *Wood*, 1 Wheat. 6, 8-9 (1816)," and "is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ashley* v. *City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 417 (1st ed. 1981)). This "deep-rooted historic tradition," which is embodied in both the Due Process Clause and the various rules that Congress has enacted to govern the administration of the federal courts, recognizes that just and accurate decisionmaking is more likely to result when courts allow persons to present their own cases, at the time and place of their own choosing. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 327 n.7; *Blonder-Tongue Laboratories, Inc.* v. *University Found.*, 402 U.S. at 328-329; see generally 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3841, at 200-202 (1st ed. 1976); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4449, at 415-419 (1st ed. 1981); *id.* § 4452, at 446-453.

To be sure, producing just and accurate judicial decisionmaking is not the only legitimate concern of our legal system. Finality, efficiency, and consistency of decision are also substantial concerns. Accordingly, procedural devices exist for bringing nonparties into litigation and, in appropriate circumstances, a person may be joined in and thus become bound by litigation in which he would prefer not to participate. See Fed. R. Civ. P. 19.

Indeed, a person may be bound by litigation to which he is not a party where there are sufficient assurances that his interests are adequately represented in that litigation by a certified class (see *Hansberry* v. *Lee*, 311 U.S. at 41-42; Fed. R. Civ. P. 23), where he has sufficient control over the conduct of one of the parties to that litigation (see *Montana* v. *United States*, 440 U.S. 147, 154-155 (1979); 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4451, at 427), or where there is a special remedial scheme—as, for example, exists in bankruptcy, reorganization, environ-

mental [8] and probate statutes—that expressly forecloses successive litigation by nonparticipants (see 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4452, at 451, § 4458, at 520-521; see also *Chicago, R.I. & P. Ry.* v. *Schendel*, 270 U.S. 611, 618-620 (1926)).

Despite petitioners' assertions, none of the exceptions to the general rule against preclusion of nonparties applies in this case.[9] Here, the *Wilks* respond-

[8] See, *e.g.*, the Clean Air Act, 42 U.S.C. 7604(b)(1)(B); the Clean Water Act, 33 U.S.C. 1365(b)(1)(B); and the Resource Conservation and Recovery Act, 42 U.S.C. (Supp. IV) 6972(b)(1)(B).

[9] Nor do petitioners' references to *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968), and *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), offer support for barring litigation by individuals who were not consulted and never agreed to the terms of a consent decree. The *Penn-Central* case involved the review of ICC merger and inclusion orders that were part of a vast reorganization of rail transportation implementing the congressional policy favoring consolidation of the nation's railroads into a limited number of systems. In that case, parties filed actions in a number of district courts seeking to challenge the orders of the Interstate Commerce Commission approving the merger of 36 rail carriers into the Penn-Central system and directing that three smaller railroads be included in the Norfolk & Western system. Courts other than the three-judge District Court for the Southern District of New York stayed those actions in order to permit orderly disposition of the issues in the New York litigation. 389 U.S. at 496-497. The Borough of Moosic, Pennsylvania, a plaintiff in an action before the Middle District of Pennsylvania, petitioned this Court for a writ of mandamus or certiorari seeking to overturn the stay order (*id.* at 503). That petition was consolidated with a number of appeals from the three-judge panel's order approving the merger and the inclusion of the three protected rail lines into the Norfolk & Western system.

This Court affirmed the district court's order approving the merger and inclusion (389 U.S. at 498-502). Turning to the

ents filed a lawsuit separate and apart from the *Jefferson County* litigation. The parties in the initial

Borough's petition for mandamus or certiorari, the Court held that the Pennsylvania district court's order dissolving its stay had rendered that petition moot (*id.* at 503). The Court also concluded that the Borough and two other parties, both of whom had originally joined in the New York litigation but had abandoned those efforts by intervening in the stayed Pennsylvania action, could not then seek to enjoin the merger and inclusion orders in the latter forum because the "decision of the New York court which, with certain exceptions, we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes" (*id.* at 505-506). The Court stated, however, that its holding applied only to the Pennsylvania district court's stay order and that "any claims for specific relief, such as particularized objections which may arise from specific proposals for consolidation or reduction of facilities or services, are unaffected by [the Court's] decision * * *" (*id.* at 506). Thus, those parties who elected not to participate in the primary litigation in the Southern District retained the right to challenge in court specific steps taken pursuant to the consolidation believed to have detrimental effects upon them.

In *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), the Court was confronted with the question whether a judgment against an insurance company should be allowed to stand where the parties failed to join the insured party whose policy was limited by a liability cap and whose rights to future coverage under the policy would thus be affected by the outcome of the present case. In upholding the judgment, the Court specifically declined to decide whether an arguably indispensable party who "purposely bypassed an adequate opportunity to intervene" should be bound by the court's decision made in his absence. However, the Court did state that since the arguably indispensable party was "never before the [district] court, he cannot be bound by the judgment rendered," *i.e.*, the judgment would not be "*res judicata* as to, or legally enforceable against, a nonparty." 390 U.S. at 110 (footnote omitted); see also *id.* at 122 ("there can be no binding adjudication of a person's rights in

litigation did not attempt to join the *Wilks* respondents as parties to their litigation—and did not seek their approval of the consent decree—despite their knowing full well that the proposed settlement would adversely affect such nonparties' interests. And there has been no showing that any certified class in the primary lawsuit adequately represented the *Wilks* respondents' interests,[10] or that the *Wilks* respondents had control over the conduct of any party in the *Jefferson County* litigation. On the contrary, the court of appeals explicitly found that (Pet. App. 16a)

> [g]iven the disparate interests of the City and the [*Wilks* respondents], it is clear that the City could not have served as an effective surrogate for the [respondents'] interests when it negotiated the plan incorporated into the consent decrees.

Thus, under time-honored rules of due process and civil procedure, the court of appeals correctly held

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the absence of that person" (citing *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827)). Accordingly, the Court observed that the absent party "may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue" (390 U.S. at 114). In other words, contrary to petitioners' suggestions, *Patterson* does not at all signal the Court's retreat from the principle that judgments are binding only upon those party or privy to the litigation.

[10] As petitioners point out, the record shows that the BFA, the union to which the *Wilks* respondents belong, appeared at the fairness hearing and presented objections to the proposed consent decree. Assuming that the BFA in fact represented the *Wilks* respondents' interests and voiced their objections, there is no suggestion that its participation amounted to an agreement to the terms of the consent decree, such as would foreclose further litigation of the issues presented. *Firefighters* v. *Cleveland*, 478 U.S. 501, 528-530 (1986); see also *Firefighters* v. *Stotts*, 467 U.S. 561, 588 n.3 (1984) (O'Connor, J., concurring).

that the *Wilks* respondents may proceed with their suit.[11] See *Firefighters* v. *Cleveland*, 478 U.S. 501, 528-530 (1986); *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); see also *United States* v. *Mendoza-Lopez*, No. 85-2067 (May 26, 1987), slip op. 9-13.

C. *The Collateral Attack Doctrine Is Inconsistent With The Rules Of Intervention And Joinder Established By the Federal Rules of Civil Procedure*

Petitioners contend that the court below erred in refusing to follow the line of cases holding that collateral attacks on consent decrees in Title VII actions are not permissible, especially where the *Wilks* respondents were aware of the underlying lawsuit and the proposed consent decrees, and had an opportunity to intervene in the proceedings.[12] Petitioners argue

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[11] Title VII does authorize the Attorney General and the Equal Employment Opportunity Commission to initiate lawsuits on behalf of aggrieved individuals and, in such cases, gives the aggrieved individuals an absolute right to intervention. See 42 U.S.C. 2000e-5(f)(1). Some courts have therefore held that the statutory scheme precludes those aggrieved individuals from initiating successive litigation once the government's litigation has concluded. See, *e.g.*, *Adams* v. *Proctor & Gamble Mfg.*, 697 F.2d 582 (4th Cir. 1983) (en banc), cert. denied, 465 U.S. 1041 (1984); *Jones* v. *Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980). Whether those decisions are correct or not, they make clear that Title VII contains no provision authorizing a private litigant to initiate an action on behalf of another individual and thereby preclude that individual from bringing an action on his own behalf at the time and place of his own choosing (absent formal class certification procedures).

[12] See, *e.g.*, *Devereaux* v. *Geary*, 765 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Thaggard* v. *City of Jackson*, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Stotts* v. *Memphis Fire Dep't*, 679 F.2d 541 (6th

that allowing challenges to consent decrees entered in Title VII litigation will prevent the attainment of final judgments and raise the specter of inconsistent or contradictory proceedings. They urge that the appropriate resolution of competing concerns is to require that persons with interests affected by ongoing Title VII litigation, such as the *Wilks* respondents, intervene in those lawsuits or face preclusion by the judgments entered therein.

Such a resolution, however, is incompatible with the Federal Rules of Civil Procedure. The drafters of those Rules expressly faced the concerns about finality and the desire of nonparties to relitigate issues previously decided. They recognized that rules of intervention have always been drawn in permissive terms and, therefore, that nonparties can refrain from intervention in litigation that affects them.[13] Rather

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Cir. 1982), rev'd on other grounds *sub nom. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *Dennison* v. *City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (9th Cir. 1981); *Goins* v. *Bethlehem Steel Corp.*, 657 F.2d 62 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); *Society Hill Civic Ass'n* v. *Harris*, 632 F.2d 1045 (3d Cir. 1980).

[13] See Fed. R. Civ. P. 24(a) (intervention as of right) ("[u]pon timely application anyone shall be permitted to intervene"); Fed. R. Civ. P. 24(b) (permissive intervention) ("[u]pon timely application anyone may be permitted to intervene"). See also *Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 441 (1934) ("The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."); accord, *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Gratiot County State Bank* v. *Johnson*, 249 U.S. 246, 249-250 (1919).

than redraft the rules of intervention in mandatory terms, however, they determined that the concern for finality of judgments would be "better [served] by mandatory joinder procedures" (18 C. Wright, A. Miller & E. Cooper, *supra*, § 4453, at 453). Accordingly, they added Rule 19 to the Federal Rules of Civil Procedure. See Advisory Committee's Note to Fed. R. Civ. P. 19.

Rule 19 has two parts. Part (a) requires the existing parties and the court to join those persons whose presence is necessary and desirable for a just adjudication.[14] Part (b) requires the existing parties and the court to work out a fair and just solution when joinder is not possible—so that neither the absent person nor those already party to the litigation will be prejudiced by, for example, the issuance of a decree that impairs their rights or exposes them to double, multiple, or otherwise inconsistent obliga-

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[14] Rule 19(a) (emphases added) provides that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction * * * *shall* be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) *the person claims an interest relating to the subject of the action* and is so situated that the disposition of the action in the person's absence may (i) *as a practical matter impair or impede the person's ability to protect that interest* or (ii) *leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.* If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

tions.[15] Together, parts (a) and (b) of Rule 19 place the responsibility (and means) for obtaining a final judgment with the courts and the existing parties, and *not* with the nonparties (such as the *Wilks* respondents) to the litigation. Accord, *Consumers Union of the United States, Inc.* v. *Consumer Products Safety Comm'n*, 590 F.2d 1209, 1223 (D.C. Cir. 1978), rev'd on other grounds *sub nom. GTE Sylvania, Inc.* v. *Consumers of the United States, Inc.*, 445 U.S. 375 (1980). The judicially developed collateral attack doctrine cavalierly ignores this allocation of responsibility and is thus irreconcilable with the procedural scheme envisioned by the drafters of Rule 19 and the Congress that approved that rule's adoption.[16]

[15] Rule 19(b) provides that

> [i]f a person * * * cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[16] As Professor Laycock has observed, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 142 (footnotes omitted):

> *A* best knows what relief he is seeking, and if that relief will directly interfere with *C*'s arguable claim of right, *A* is seeking relief against *C* just as much as he is seeking relief against *B*. *A* will typically know about *C* at least as soon as *C* knows about *A*'s lawsuit and the requested relief—usually long before. It is *A*'s responsibility to join *C*. If *A* does not join him, Rule 19 requires the court to order that he be joined. *C* has no similar duty to intervene. Rule 19 imposes a duty; Rule 24 creates only an opportunity. The plaintiff and the court should not be allowed to ignore their responsibilities under Rule 19, and then oppose intervention or subsequent litigation on grounds of timeliness.

Petitioners offer no sound basis for ignoring the clear meaning of Rule 19. They raise (87-1668 Br. 32-34) the specter of unmanageable lawsuits if joinder under Rule 19 is required. However, even under petitioners' proposed "intervene or be bound" rule, that possibility exists, see *United Airlines* v. *McDonald*, 432 U.S. 385, 394 n.15 (1977); in any event, multi-party lawsuits are one of the inherent costs of insulating judgments or consent decrees from third-party challenges. A Title VII defendant who wishes to insulate himself against future liability to third parties by virtue of the terms of a present settlement can only do so by joining those parties in the settlement.

Petitioners also overstate the difficulties of defendant class actions under Rule 23 (87-1668 Br. 33). Numerous defendant class actions have ben prosecuted, and we see no reason to doubt that district courts can be entrusted with "the responsibility and discretion to create and certify defendant class actions that will not become constitutional or administrative monsters." *Henson* v. *East Lincoln Township*, 814 F.2d 410, 420 (7th Cir. 1987) (Campbell, J., concurring in part and dissenting in part), cert. granted, No. 87-5461 (Nov. 2, 1987); see generally Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 639-647 (1978). In the typical case, such as here, nonminority employees whose rights would likely be affected by the resolution of the minority employees'

claims could be joined as a class under Rule 23(b)(1)(A), which applies "when practical necessity forces the opposing party [*i.e.*, the employer] to act in the same manner toward the individual class members and thereby makes inconsistent adjudications in separate actions unworkable or intolerable." 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1773, at 434 (2d ed. 1986).[17] Moreover, such class members could not easily avoid the binding effect of the judgment because the "opt out" provision would be unavailable. See *Reynolds* v. *National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (where class actions maintainable under Rule 23(b)(1) or Rule 23(b)(3), former controls for purposes of determining binding effect of judgment in order to further that provision's purpose of eliminating risk of inconsistent adjudications); *Robertson* v. *National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977) (same); see also 7A C. Wright, A. Miller & M. Kane, *supra*, § 1772, at 425-426.[18]

Nor can the collateral attack doctrine be justified (see, *e.g.*, 87-1614 Br. 22-30; 87-1639 Br. 14-17; 87-1668 Br. 18-20) as necessary to avoid the danger of inconsistent or contradictory proceedings. That objective is one of the principal purposes of Rule 19, whose provisions are essentially circumvented by a ban on collateral challenges. See Fed. R. Civ. P. 19(a) (joinder required where person's absence

[17] The class action the court condemned in *Henson* v. *East Lincoln Township*, 814 F.2d 410 (7th Cir. 1987), cert. granted, No. 87-5461 (Nov. 2, 1987), was proposed under Rule 23(b)(2), which, as stated above, would not likely be used in the context of cases such as this.

[18] Under Rule 23(c), the "opt out" alternative is not available to Rule 23(b)(1) class members.

would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations"); see also McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707, 723-724 (1976).[19] Moreover, transfer and consolidation procedures are available to prevent judicial proceedings from multiplying uncontrollably or undesirably and to enable a single judge to control litigation that is initiated by different parties in different places. See 28 U.S.C. 1404(a); Fed. R. Civ. P. 42; *Bolden* v. *Pennsylvania State Police*, 578 F.2d 912 (3d Cir. 1978); 15 C.

[19] Contrary to the *Arrington* petitioners' claim (87-1668 Br. 31), *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), does not suggest that Rule 19 is inapplicable to "public rights" litigation. There, the Court stated that the Board's proceeding, which was "narrowly restricted to the protection and enforcement of [the] public rights [reflected in the National Labor Relations Act]," was not a proper forum for adjudicating the private rights of individual employees (*id.* at 363). The Court held, therefore, that the Board had the power, "acting in its public capacity to give effect to the declared public policy of the Act" (*id.* at 362), to order the employer, without first joining the employees, to cease practices that violate that policy.

In so holding, the Court noted, as we have argued here, that the Board lacked the power to issue a binding ruling on the contract rights of the individual employees who were not party to the Board's proceeding. See 309 U.S. at 362 ("It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law."). The Court thus made clear that the Board's order did "not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication" (*id.* at 365).

Wright, A. Miller & E. Cooper, *supra*, § 3841, at 200-202; *id.* § 3485, at 287.[20]

Indeed, even where joinder, transfer, and consolidation devices will not together ensure that only a single binding judgment can result concerning any particular matter, principles of stare decisis and comity will inform the second court that acquires jurisdiction over that matter and thus minimize the possibility of inconsistent or contradictory judgments. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 181-182 (1952). And, in all events, the concern for correctness of judicial decisionmaking is as important as the concern for consistency among judgments and, accordingly, some inconsistent or contradictory judgments must be accepted.[21]

In trying to eliminate (rather than to minimize) the possibility of such inconsistent judgments, the

[20] See also Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. (1988) (forthcoming) (criticizing collateral attack doctrine as illegitimate effort to eliminate nonparties' substantive rights and advocating use of transfer and consolidation procedures under 28 U.S.C. 1404(a) and 1631 as readily available alternatives).

[21] Where such inconsistent or contradictory judgments arise, well-established procedures are available to ensure that the person subject to those judgments does not place himself in contempt of either court's judgment. The person may, of course, seek reversal of the second judgment on appeal. And, if unsuccessful on appeal, the person will have an appropriate ground upon which to seek relief from the court entering the first judgment. See Fed. R. Civ. P. 60. Thus, the *Martin* petitioners' concern (87-1614 Br. 26-27) is overstated and is also dispelled by the history of this litigation. See *United States* v. *Jefferson County*, 720 F.2d 1511, 1517-1519 (11th Cir. 1983).

collateral attack doctrine ignores our "clear experience with the general fallability of litigation and with the specific distortions of judgment that arise from the very identity of the parties" (18 C. Wright, A. Miller & E. Cooper, *supra*, § 4449, at 417). Ironically, that experience has been most evident in cases involving Title VII consent decrees, which themselves amount to "little more than a contract between the parties, formalized by the signature of a judge" (*Ashley* v. *City of Jackson*, 464 U.S. at 902 (Rehnquist, J., dissenting from denial of certiorari); see also *Firefighters* v. *Cleveland*, 478 U.S. at 517-524), and which involve strong incentives and opportunity to make innocent and unrepresented third-persons pay the price of sins that were not their own and from which they may not personally have benefitted.[22] Accord, *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 767-770, 771-772 (1983); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-240 (1983).[23]

[22] Examples of this phenomenon are not limited to Title VII litigation. See, *e.g.*, *Wilder* v. *Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (settlement of suit in which New York City agreed not to support with public funds private charitable organizations that gave preference to Catholic and Jewish children; consent decrees entered over objections of the charities at a fairness hearing), aff'd, 848 F.2d 1338 (2d Cir. 1988); *Harrisburg Chapter of the American Civil Liberties Union* v. *Scanlon*, 500 Pa. 549, 458 A.2d 1352 (1983) (named parties settled lawsuit by agreeing that student groups could not conduct extracurricular prayer meetings on high school property; no affected student group participated in the litigation). See also Epstein, Wilder v. Bernstein: *Squeeze Play By Consent Decree*, 1987 U. Chi. Legal F. 209.

[23] See also *Firefighters* v. *Stotts*, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 787-799 (Powell, J., concurring in part and dissenting in part); *Johnson* v. *Transpor-*

In arguing for a rule of "intervene or be bound," petitioners and amici paint a rosy picture regarding the availability of intervention as an avenue for relief for nonparties. See, *e.g.*, Brief of the Equal Employment Advisory Council as Amicus Curiae 12 ("Intervention is liberally available in Title VII proceedings."). In fact, strict rules concerning timeliness of intervention have been applied by several courts of appeals, with the result that application of the collateral attack doctrine may leave many interested third-persons without any opportunity to be heard at all. For this very reason, the collateral attack doctrine has been criticized by members of this Court, various courts of appeals, and numerous commentators.[24]

Several courts of appeals have held that the timeliness of intervention must be measured from the date upon which a complaint or proposed consent decree is filed, rather than from the date on which the would-be intervenors' cause-of-action allegedly accrued, whether their interests have been adversely affected at that earlier time or not. See, *e.g.*, *United*

tation Agency, No. 85-1129 (Mar. 25, 1987), slip op. 19-21 (Scalia, J., dissenting); *Firefighters* v. *Cleveland*, 478 U.S. at 534-535 (White, J., dissenting).

[24] See *Ashley* v. *City of Jackson*, 464 U.S. at 901-902, 904 (Rehnquist, J., joined by Brennan, J., dissenting from the denial of certiorari); *Dunn* v. *Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986); *Corey* v. *Jackson Police Dep't*, 755 F.2d 1207, 1210 (5th Cir. 1985); Cooper, *The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process*, 1987 U. Chi. Legal F. 155; Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. (1988) (forthcoming); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103.

States v. *Yonkers Bd. of Educ.*, 801 F.2d 593, 594-596 (2d Cir. 1986); *Devereaux* v. *Geary*, 765 F.2d 268, 271-275 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1209-1210 (5th Cir. 1985). Thus, it may well be impossible in some circuits for third parties to intervene and challenge a proposed consent decree. On the one hand, before the consent decree is made public, they may not be aware that it has been proposed or they may not have yet suffered the concrete injury on which they can properly base a motion for intervention. See, *e.g.*, *Firebird Society, Inc.* v. *Board of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn.), aff'd mem., 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975). And, on the other hand, if they delay their attempt at intervention (until their interest becomes concrete), they will quite likely be turned away as having moved untimely to intervene.[25]

D. *The Collateral Attack Doctrine Cannot Be Justified By Reference To The Policy Favoring Voluntary Settlements Under Title VII*

The denial of due proces implicit in the collateral attack doctrine cannot be justified by reference to the policy of voluntary settlement of Title VII disputes. To be sure, "Congress [has] expressed a strong preference for encouraging voluntary settle-

[25] Moreover, even where intervention is held timely, the interested third-persons are typically allowed only to voice their objections to the "reasonableness" of the decree. See, *e.g.*, *Kirkland* v. *New York State Dep't of Correctional Services*, 711 F.2d 1117, 1129 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984). This limited right of allocution before judgment is not the full and fair opportunity to be heard that due process requires that a person ultimately receive—as this Court has said. *Firefighters* v. *Cleveland*, 478 U.S. at 529-530.

ment of employment discrimination claims" (*Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)), and this Court accordingly has required that the resolution of interpretive questions concerning Title VII take account of the policy favoring voluntary settlement (see, *e.g.*, *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 12 & n.8; *Ford Motor Co.* v. *EEOC*, 458 U.S. at 229; *Carson* v. *American Brands, Inc.*, 450 U.S. at 88 n.14). But the Court has also explicitly recognized that the policy favoring settlement of Title VII disputes cannot be used to justify the abrogation of nonparties' protected legal interests.

In *Firefighters* v. *Cleveland*, *supra*, the Court held that, while the policy favoring voluntary settlement of Title VII suits allows a court to approve race-conscious consent decrees, that policy does not preclude a union representing nonminority employees from challenging such a decree on its merits. On the one hand, the Court noted, "[i]t has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearing on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent" (478 U.S. at 528-529). On the other hand, the Court added, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors" (*id.* at 529). Rather, the Court concluded, "if properly raised, these claims remain and may be litigated by the [third-party]" (*ibid.*). Accord, *id.* at 530-531 (O'Connor, J., concurring); *W.R. Grace Co.* v. *Rubber Workers*, 461 U.S. 757, 770-771 (1983); see also *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 281 n.8 (1986) (plurality opinion).[26]

It is a gross overstatement to suggest, as do petitioners (see 87-1614 Br. 21-22; 87-1639 Br. 13-14; 87-1668 Br. 14-18), that settlement would lose its

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[26] In *W.R. Grace Co.* v. *Rubber Workers*, 461 U.S. 757 (1983), where an employer entered into a conciliation agreement with the EEOC that required it to disregard the seniority provisions of its extant collective bargaining agreement, the Court held that the policy favoring voluntary settlement of Title VII suits did not provide sufficient justification for overturning an arbitration award that required the employer to pay damages to employees who would not have been laid-off had the collective bargaining agreement's seniority provisions been followed. The Court noted that, "[a]lthough the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the [EEOC], the employer's added incentive to conciliate would be paid for with the union's contractual rights" (as well as the rights of individual employees) (461 U.S. at 771; *id.* at 770). The Court further noted that "conferring such power on the [EEOC] and an employer * * * would be unlikely to further *true conciliation between all interested parties*" (*ibid.* (emphasis added)), reasoning that, "[a]lthough an innocent union might decide to join in Title VII conciliation efforts in order to protect its contractual position, neither the employer nor the [EEOC] would have any incentive to make concessions to the union * * * [since they] would know that they could agree without the union's consent and that their agreement would be enforced" (*ibid.*). And, conversely, the Court added, "enforcing the award * * * should encourage conciliation and *true voluntary compliance with federal employment discrimination law*" because it would require that all employees' rights be respected in Title VII settlement negotiations (*ibid.* (emphasis added)).

utility if further litigation were permitted. To the extent the parties are compromising their own claims and thus sharing the cost of settlement among themselves, very little reduction in settlement incentives should occur. See *W.R. Grace Co.*, 461 U.S. at 771-772. The parties' incentive to settle would be eroded only to the extent that the settlement might give rise to liability on their part to the *Wilks* respondents (for the costs of the settlement, if any, that the *Wilks* respondents have been improperly asked to bear). Even then, it would appear that the diminution of incentive to settle between the existing parties would be no greater than is appropriate in light of the economic benefits that the settlement will have for them. The policy in favor of voluntary compliance and settlement under Title VII is promoted only where *all* persons with an interest in a Title VII dispute are party to a resulting consent decree or, in the absence of such consensus, where any consent decree that results can withstand substantive challenge from third-parties whose own Title VII rights are claimed to have been abridged. Compliance with Title VII is not encouraged when parties are allowed to ignore and, indeed, abrogate the rights of those who are not present.[27]

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[27] See also *Firefighters* v. *Stotts*, 467 U.S. at 588 n.3 (O'Connor, J., concurring) ("if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process"; *id.* at 589 n.4 ("[t]he policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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